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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. ~~1850~~ 168

WALLACE GLICK, by His Guardian and Curator, Bessie McGinty, and Bessie McGinty, Individually,
Appellants,

vs.

BALLENTINE PRODUCE INCORPORATED, Charles James Harris, C. J. Harris, and Alice J. Reed, Administratrix of the Estate of William Claire Reed, Deceased,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

APPELLEES' MOTION TO DISMISS APPEAL

and

BRIEF OF APPELLEES IN SUPPORT OF MOTION TO DISMISS APPEAL

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Come now appellees Ballentine Produce Incorporated, Charles James Harris, C. J. Harris, and Alice J. Reed, Ad-

ministratrix of the Estate of William Claire Reed, Deceased, and for their Motion to Dismiss this appeal state:

1. The appeal does not present a substantial Federal question because:

(a) No cause of action for wrongful death exists at common law, and Section 537.090, R.S., Mo., 1959, is an inherent part of the wrongful death law validly created, conditioned and limited by the legislature of the State of Missouri.

(b) Section 537.090, R.S., Mo., 1959, does not abridge or affect any privileges or immunities of appellants guaranteed by the Federal Constitution and, therefore, cannot be repugnant to Amendment XIV, U. S. Constitution.

(c) Section 537.090, R.S., Mo., 1959, does not deprive appellants of or affect any right of property protected by the Federal Constitution and, therefore, cannot be repugnant to Amendment XIV, U. S. Constitution.

(d) Section 537.090, R.S., Mo., 1959, does not discriminate against appellants and, therefore, cannot be repugnant to Amendment XIV, U. S. Constitution, as a denial of equal protection of the laws.

(e) Appellants are citizens and residents of the State of Missouri and, therefore, Section 537.090, R.S., Mo., 1959, cannot and does not deprive appellants of any privileges and immunities under Article IV, Section 2, U. S. Constitution.

For the above and foregoing reasons, Appellees pray the order of the Court dismissing this appeal.

Respectfully submitted,

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF OF APPELLEES IN SUPPORT OF MOTION TO DISMISS APPEAL

ARGUMENT

This appeal is predicated upon the proposition that Section 537.090, R.S., Mo., 1959, is unconstitutional by reason of being repugnant to Amendment XIV and Article IV,

Section 2, U. S. Constitution. Section 537.090 limits recovery to a maximum of $25,000.00, as part of the wrongful death law created by statutory law of the State of Missouri. Prior decisions of this Court have clearly and finally determined that such an action may be created and validly conditioned by a state legislature. This Court has long since established, by its holdings, that no action for wrongful death exists at common law and that any such rights may be validly created and conditioned by a state, and that such rights are not guaranteed or protected by the Federal Constitution nor are they repugnant to it. Because of these well-established principles, there is no substantial Federal question raised on this appeal.

I

No Cause of Action for Wrongful Death Exists at Common Law, and Section 537.090, R.S., Mo., 1959, Is an Inherent Part of the Wrongful Death Law Validly Created, Conditioned and Limited by the Legislature of the State of Missouri

Appellants have no rights which are abridged or denied by the Missouri wrongful death law, both because there is no such action at common law and because the State may validly create, condition and amend any such rights by statute.

This Court succinctly stated the maxim many years ago in *Insurance Company* v. *Brame*, 95 U.S. 754, l.c. 756:

> "The authorities are so numerous and so uniform to the proposition, that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the State courts, and no deliberate, well-considered decision to the contrary is to be found. * * *"

This proposition has been affirmed and accepted by both the Federal and Missouri Courts. *Panama R. Co.* v. *Rock*, 266 U.S. 209; *Richards* v. *United States*, 369 U.S. 1; *Glick* v. *Ballentine*, Mo. Sup., 396 S.W.2d 609.

Recognizing the need to provide for controversies and rights growing out of relations between people within its borders, the State of Missouri enacted the wrongful death law of Missouri. In so doing, it made Section 537.090 an inherent part of the wrongful death law, conditioning and limiting the law by providing for maximum recovery of $25,000. *Glick* v. *Ballentine*, supra; *Richards* v. *United States*, supra.

Such a law, providing damages for civil injuries, not recognized by the common law, is properly within the power of the State to make provisions for the controversies and rights that may grow out of the relations of its people. *Atchison, T. & S.F. Ry. Co.* v. *Nichols*, 264 U.S. 348, 352. Since this wrongful death action is a right both given and created by the State Legislature, it can most assuredly be conditioned or limited and such condition or limitation cannot raise any Federal constitutional question because it does not affect any right pre-existing the enactment of the statute.

II

Section 537.090, R.S., Mo., 1959, Cannot Be an Abridgment of Privileges and Immunities Guaranteed by Amendment XIV, U. S. Constitution

There is no cause of action for wrongful death at common law and the statute in question here is an inherent part of the wrongful death law of the State of Missouri, created and properly conditioned and limited by the legislature of that state (Point I, supra).

The right to sue and recover damages for wrongful death is, therefore, a right or privilege of state citizenship, not of national citizenship, and is not protected by the privileges and immunities clause. *Snowden* v. *Hughes*, 321 U.S. 1. In that case, the Court held, l.c. 6, 7:

> "The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law."

III

Section 537.090, R.S., Mo., 1959, Does Not Affect Any Right of Property Guaranteed by Amendment XIV, and Cannot Be a Deprivation of Property Without Due Process of Law

Since an action for wrongful death does not exist in common law, and in any event, is not a right guaranteed by the Federal Constitution, Section 537.090 cannot constitute taking of property without due process of law.

A concise summary of the rights protected by the Fourteenth Amendment was given in the case of *Screven County* v. *Brier Creek Hunting and Fishing Group*, (5th Cir.) 202 F.2d 369, l.c. 371:

> "The Fifth and Fourteenth Amendments did not create any new rights to life, liberty, or due process of law. These rights had existed for Englishmen since Magna Charta. The Declaration of Independence and the Revolution of 1776 merely declared and established these rights for the American Colonies. The Tenth Amendment reserved them to the people of the newly created states; the Fifth Amendment protected them from molestation by the newly created federal govern-

ment; and the Fourteenth Amendment safe-guarded them from violation by the several states of the re-welded union. These were common-law rights, which the people of this nation have sought by three federal constitutional amendments to preserve inviolate to themselves. They are protected by the federal constitution from violations by the state or federal governments, but not from individual trespasses except for violations of a federal statute enacted in pursuance of the federal constitution. In the instant case, no federal statute is relied upon by the appellee, and no state or federal action is alleged to have threatened to take or injure its property. Barron v. Baltimore, 7 Pet. 243, 32 U.S. 242, 8 L.Ed. 672; Boyd v. United States, 116 U.S. 616, 624-641, 6 S.Ct. 529, 29 L.Ed. 746; Spies v. Illinois, 123 U.S. 131, 8 S.Ct. 22, 31 L.Ed. 80; Twining v. New Jersey, 211 U.S. 78, 100-114, 29 S.Ct. 14, 53 L.Ed. 97; Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, L.R.A. 1915B, 834, Ann. Cas. 1915C, 1177; Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647; Burdeau v. McDowell, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048, 13 A.L.R. 1159; Feldman v. United States, 322 U.S. 487, 490, 64 S.Ct. 1082, 1083, 88 L.Ed. 1408, 154 A.L.R. 982; Entich v. Corrington, 1765, 19 Howell's State Trials, 1029; Hall v. United States, 9 Cir., 41 F.2d 54."

Appellants cannot be deprived of a right of property, which they would not have, were it not given to and created for them by the state. Whether a right of property is created by common law or statutory law, an individual person has no vested property interests in any such rule of law. Such a right, once created, cannot be taken away without due process. But the law itself may be changed at the will of the Legislature, which is, indeed, only fulfilling its function to remedy, by statutes, defects in the common law and to adapt the law, both statutory and common, to the changes of time and circumstances. Such changes and remedies are not denials of due process. *Mondou v. New York, N.H. and H.R. Co.*, 223 U.S. 1.

IV

Section 537.090, R.S., Mo., 1959, Cannot Be a Denial of Equal Protection of the Law under Amendment XIV, U. S. Constitution

The wrongful death law involved here, including the limitation of recovery, is a broad law which applies to any death occurring in the State of Missouri with equal right and remedy available to all persons regardless of citizenship or domicile. It does not discriminate against any particular class or classes of persons. The remedy is available to all who fall within the purview of the right created by the legislature.

Such a statute cannot afford any substantial basis to a claim of discrimination under the equal protection clause of the Fourteenth Amendment. This Court has held that:

> "The inhibition that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation." *McPherson* v. *Blacker*, 146 U.S. 1, l.c. 39.

The privileges and immunities protected by the Fourteenth Amendment are privileges and immunities arising out of the Federal government and granted or secured by the Constitution. *Duncan* v. *Missouri*, 152 U.S. 377. A right of action created by a state legislature arising out of events which occurred within the territorial jurisdiction of that state is not a privilege or immunity granted or secured by the Federal Constitution. Even in cases where a state legislature has abrogated common law rights and provided substitute remedies and rights, specifically Workmen's Compensation laws, this Court has held that such a statute is not a denial of equal protection of the laws.

Northern Pacific Railroad Company v. *Neese*, 239 U.S. 614. See also *Schloss* v. *Matteucci*, (10th Cir.) 260 F.2d 16.

V

Appellants Are Not and Cannot Be Deprived of Any Privileges and Immunities under Article IV, Section 2, Clause 1, U. S. Constitution

It clearly appears from the record brought up by appeal (Appellants' Transcript on Appeal, Page 21) that appellants are citizens and residents of the State of Missouri.

This Court has clearly held that Article IV, Section 2, Clause 1, U. S. Constitution, in effect, prevents a state from discriminating against the citizens of other states in favor of its own. *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496, 511. Article IV, Section 2, U. S. Constitution, is limited to circumstances wherein diversity of citizenship exists, a condition totally absent here. *Blass* v. *Weigel*, (D.C. New Jersey) 85 F. Supp. 775, 781.

CONCLUSION

By reason of the above and foregoing, it becomes clear that the decision of the Missouri Supreme Court, in the case below, does not violate any rights of appellants, that Section 537.090 is not repugnant to Amendment XIV or Article IV, Section 2, U. S. Constitution, and that no

substantial Federal question is raised on this appeal. The appeal should, therefore, be dismissed.

Respectfully submitted,

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